Commission Decision (EU) 2019/367 of 9 November 2018 on the measure SA.35065 (2016/C) (ex 2016/NN, 2012/FC) implemented by the United Kingdom for MMD Shipping Services Ltd (notified under document C(2018) 7360) (Only the English text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2019/367

of 9 November 2018

on the measure SA.35065 (2016/C) (ex 2016/NN, 2012/FC) implemented by the United Kingdom for MMD Shipping Services Ltd

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) On 10 April 2013, the Commission received a complaint alleging unlawful aid provided by Portsmouth City Council ('PCC') to MMD Shipping Services Ltd ('MMD'). The submission of a formal complaint was preceded by an informal submission by the complainant of 8 June 2012 and a meeting of 29 November 2012.

(2) The Commission forwarded the complaint to the United Kingdom on 8 May 2013. The United Kingdom provided their comments on 1 July 2013. On 10 October 2013, the Commission sent a request for additional detailed information about the measures alleged. The United Kingdom replied on 25 November 2013 and 9 December 2013.

(3) The Commission met with the complainant on 10 April 2014, and, on 16 April 2014 sent a non-confidential version of the United Kingdom submissions to the complainant for their comments. The complainant provided comments on 12 November 2014.

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/367. (See end of Document for details)*

(4) By letter dated 19 September 2016, the Commission notified the United Kingdom of its decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the measure. The United Kingdom provided observations on the Commission decision to initiate the procedure by letter dated 21 November 2016.

(5) The Commission decision to initiate the procedure ('the Opening Decision') was published in the *Official Journal of the European Union*[(2)]. The Commission invited interested parties to submit their comments on the measures.

(6) The Commission received comments from two interested parties the complainant and an Anonymous Interested Party. It forwarded them to the United Kingdom on 21 January 2017, and the United Kingdom was given the opportunity to respond. Comments were received from the United Kingdom by letter dated 15 February 2017.

(7) On 26 April 2017, the Commission held a meeting with the United Kingdom. Following this meeting, the United Kingdom submitted additional information by letter dated 12 January 2018.

(8) On 18 April 2018, the Commission held a telephone conference with the United Kingdom, following which the United Kingdom submitted additional information by letters dated 5 June and 22 June 2018.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. Recipient

(9) As of 2008 MMD is a wholly-owned subsidiary of PCC and provides cargo-handling services (stevedoring, warehousing and distribution of mainly fruit and other fresh produce) to customers at Portsmouth International Port ('the Port'), which is also owned and operated by PCC. MMD is the principal cargo handling operator in the Port with a long-term lease for the main cargo handling quays. Other operations of the Port relate to roll-on, roll-off ferry services and cruise ships.

(10) MMD has an annual turnover of around GBP 15 million and employs almost 200 people. Prior to PCC's acquisition of MMD, MMD had been loss-making at least since the 2002/2003 financial year. Following its acquisition by PCC in 2008, the financial results of MMD were largely balanced thanks to the annual revenue grants provided by PCC, and without which MMD would have recorded an operating loss between 2008 and 2016. The financial year 2016/2017 was the first year that MMD recorded a profit without any revenue grant from PCC (see Table 1).

2.2. Alleged State aid measures raised by the Complainant

(11) The Complainant in its 2013 complaint identified a number of measures which it alleged constituted illegal and incompatible State aid by PCC to MMD. The alleged aid measures include:

— Measure 1: Acquisition of MMD by PCC in 2008 ('Measure 1');

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— Measure 2: Revenue grants provided annually by PCC to MMD ('Measure 2');

— Measure 3: Long-term loan facility provided by PCC to MMD as of 2010 ('Measure 3');

— Measure 4: Acquisition of two cranes by PCC and their subsequent long-term lease to MMD in 2010 and 2011 ('Measure 4');

— Measure: 5: Security for overdraft facility ('Measure 5').

(12) The original complaint argued generally that PCC did not act in line with the market economy investor principle ('MEIP') by acquiring and financially supporting a loss-making business despite its continued losses since 2008. The complaint estimated that the overall support provided by PCC to MMD would as at November 2014 amount to GBP 17,3 million. Without the continued support from PCC, MMD would have not been able to survive on the market. Thus, according to the Complainant, PCC's continued support using public funds provided a significant economic advantage to MMD and allowed MMD to offer discounted cargo handling rates to its existing and potential customers. As a result, the competition in the market for handling and storage of imported fresh produce was allegedly distorted.

2.2.1. *Measure 1: Acquisition of MMD by PCC in 2008*

(13) PCC acquired MMD from a previous private owner for a price of GBP 2,07 million. As part of the initial investment, PCC also funded MMD with additional capital investments of GBP 2,34 million in the form of capital grants and planned to cover the losses of MMD in the financial years 2008/2009 and 2009/2010 with total funds of GBP 1,443 million.

(14) Despite the claims of the Complainant, the Commission concluded in the Opening Decision that PCC acted in line with the MEIP by acquiring MMD under these conditions and therefore Measure 1 does not provide any economic advantage to MMD and does not constitute State aid. In addition, neither the Complainant nor the Anonymous Interested Party provided any additional arguments or evidence with respect to Measure 1. In view of that, Measure 1 is not assessed in this Decision.

2.2.2. *Measure 2: Revenue grants provided annually by PCC to MMD*

(15) Since the acquisition in 2008, PCC has provided MMD with revenue grants in the form of cash transfers recorded as 'other operating income', thus increasing the operating profits (and thereby reducing operating losses). The original investment case envisaged the need to cover MMD's losses only in the first two years and for a total amount limited to GBP 1,443 million. However, PCC continued to provide revenue grants after the 2009/2010 financial year and the total amount of revenue grants provided up to 2016 reached GBP 16,71 million (see Table 1 below). No revenue grant was provided in the financial year 2016/2017 and MMD recorded a profit in that year.

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TABLE 1

Revenue grants provided by PCC to MMD and profits/losses of MMD in financial years 2008/2009-2016/2017

(million GBP)

	08/09	09/10	10/11	11/12	12/13	13/14	14/15	15/16	16/17
Revenue grant	2,60	3,30	2,10	1,20	2,16	1,44	2,40	1,51	0
Operating profit (excl. revenue grants)	,84	– 2,92	– 2,03	– 1,09	– 2,04	– 1,24	– 2,18	– 1,26	+ 0,43
Total profit (excl. revenue grants)	0,62	– 2,92	– 2,04	– 1,07	– 2,16	– 1,37	– 2,33	– 1,47	+ 0,21
Total profit as reported in annual reports (i.e. incl. revenue grants)	+ 3,22	+ 0,38	+ 0,06	+ 0,13	0,00	+ 0,07	+ 0,07	+ 0,04	+ 0,21

(16) The grants were provided in the form of cash transfers in order to cover the annual trading loss of MMD. The Complainant argues that MMD would not have been viable without that constant financial support by PCC. In addition, it claims that PCC did not conduct any proper analysis of whether the provision of additional grants to MMD was economically justifiable.

2.2.3. *Measure 3: Long-term loan facility provided by PCC to MMD from 2010*

(17) In 2010, PCC decided to provide a long-term (up to 20-years) loan facility of GBP 6,944 million to MMD. The interest rate for the loan facility amounts to 4,81 %, corresponding to PCC's costs of borrowing plus an administration fee of 0,25 %. The purpose of the loan facility is to support MMD's capital expenditure. The general terms of the loan facility are set out in a Commercial Loan Agreement between PCC and MMD, while for each draw-down of the loan additional documents are necessary

(information on the capital expenditure intended to be covered by the loan, financial appraisal of each draw-down by MMD and PCC, appropriate collateral documents). Between 2010 and 2017, a total of GBP 5,7 million has been drawn-down by MMD under this facility.

(18) The Complainant argues that the loan facility by PCC provided MMD with long-term funding on terms which would not have been available to it from ordinary commercial lenders. It also claims that the loan agreement between PCC and MMD is not only unsigned but in particular lacks provisions which any commercial lender would routinely require (such as financial covenants or events of default). Finally, it argues that the financing from PCC enables MMD to invest in new operating infrastructure and assets and thus provides it with a competitive advantage. Therefore, the Complainant argues that the long-term loan facility does not correspond to market economy operator terms and, since all other criteria are also fulfilled, constitutes illegal State aid.

2.2.4. *Measure 4: Acquisition of two cranes by PCC and their subsequent long-term lease to MMD in 2010 and 2011*

(19) In order to support the operations of MMD, PCC decided in 2010 and 2011 to purchase two mobile harbour cranes for approximately GBP 2,1 million each and to lease them to MMD under an operating lease agreement valid for 7 years. The monthly rent of GBP 16 000 (in excess of GBP 190 000 per year) for each crane has been calculated so that the investment made by PCC is repaid over the expected lifetime of the cranes of 15 years while also covering PCC's own cost of capital (in total leading to effective interest rates of 4,46 % and 4,62 %).

(20) Even though the complaint does not contain any specific arguments with respect to this particular measure, the acquisition and lease of cranes belongs among the various financing measures included in the complaint by which PCC supports MMD's investment in new equipment in a manner allegedly not consistent with market conditions.

2.2.5. *Measure: 5: Security for overdraft facility*

(21) Upon acquisition, MMD was brought under the umbrella of PCC's banking relationship with Lloyds TSB Bank. In return, Lloyds TSB required an additional security cash deposit of GBP 1 million. In May 2009, this security deposit was increased to GBP 1,2 million and in spring 2010 decreased to GBP 0,55 million. In 2011, this security deposit to Lloyds TSB Bank was supplemented by a guarantee by PCC to the bank for a monthly overdraft facility of GBP 1 million available to MMD.

(22) The deposit and subsequently also the guarantee were required by Lloyds TSB Bank to cover MMD's normal commercial transactions and to serve as security for payments that the bank makes on behalf of MMD (such as CHAPS payments, BACS payments, customs indemnity facility and Corporate Charge cards). Lloyds TSB Bank is able to call upon the deposit or guarantee in the event that these payments made by the bank are subsequently not honoured by MMD.